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RECOGNIZING ILO RIGHTS TO ORGANIZE AND BARGAIN COLLECTIVELY; GREASE IN CHINA'S TRANSITION TO A SOCIALIST MARKET ECONOMY

Toby D. Merchant[†]

I. Introduction

April [2002] was a grim month in Wei Jianzhong's sooty, barracks-like neighborhood in Zhengzhou, the capital of central Henan province [in China]. That's when the Henan No. 5 Provincial Construction Co. fired its latest round of workers. The victims have gathered in Wei's cramped living room to commiserate. There's Xiong, a 53-year old former steamfitter who is trying to survive on \$12 a month in unemployment benefits. He reminisces about the time two years ago when thousands of workers from a nearby factory blocked railroad tracks and erected huge posters of the patron saint of Chinese workers – Chairman Mao – to demand their jobs back. He participated in the protest “to stand with them,” he says. Today he is out of work too. He wonders aloud, “Who will stand with me?” Kong Qingbin, who worked for 30 years as a guard at the same factory, chimes in with an idea: “Execute the factory leaders. Then maybe we'll be satisfied.”¹

Unfortunately, these circumstances are becoming a frequent consequence of the current introduction of market forces into China's former state-planned economy. Chinese workers who have grown up learning about Maoist cradle-to-grave security are now in a “state of near panic” over their job security.² Since the market reforms began in the late 1970s China's economy has quadrupled³ in size and China is experiencing

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¹ Matthew Forney, *Workers' Wasteland*, TIME ASIA, Nov. 1, 2002, available at <http://www.time.com/time/asia/covers/1101020617/cover.html>.

² Anita Chan & Robert A. Senser, *China's Troubled Workers*, FOREIGN AFF., Mar.-Apr. 1997, at 104, 111, available at <http://www.senser.com/prclamsb.htm> (last visited Jan. 23, 2004).

³ Forney, *supra* note 1.

a "rapid momentum of economic growth."⁴ However, "[t]o the men and women employed on the factory floor . . . the economic scene looks grimly different."⁵ The official unemployment rate now averages 3.4% and has been estimated to be nearly 20% in industrial rust belts.⁶ As a result, Chinese workers are "cautiously but increasingly taking collective action."⁷

To protect their livelihood, Chinese workers are resorting to protests, wildcat strikes, and factory sit-ins because they have no other viable means of protection against newly encountered market forces.⁸ Collective means, such as trade unions, are strictly prohibited and the Communist Party does not tolerate their organization and development.⁹ Participating in such collective action violates Chinese law which requires all trade unions be affiliated with a state-controlled labor federation known as the All China Federation of Trade Unions ("ACFTU").¹⁰ Leaders of worker or peasant protests calling for worker rights can expect to be detained and sentenced to prison by the Communist Party.¹¹ Those attempting to actually organize workers into trade unions independent of the ACFTU will be arrested and sentenced to prison,¹² committed to an insane asylum, or even executed. For example, Cao Maobing was committed to an insane asylum for six months because he attempted to organize an independent union at his state-run silk mill located in eastern China's Jiangsu province in 2000.¹³ Li Jiaqing, a paper mill worker has been detained in the Zhengzhou No. 2 Detention Center since February of 2001 for organizing a workers'

⁴ Cable News Network, *No Slowdown for China, Planners Predict* (Nov. 10, 2002), at www.cnn.com/2002/BUSINESS/asia/11/10/china.econ/index.html [hereinafter *No Slowdown for China*].

⁵ Chan & Senser, *supra* note 2, at 104, 104.

⁶ Matthew Forney & Neil Gough, *Working Man Blues*, TIME ASIA, Apr. 1, 2002, available at <http://www.time.com/time/asia/magazine/article/0,13673,501020401-219894,00.html>.

⁷ *Id.*

⁸ Erik Eckholm, *Workers' Rights Are Suffering in China as Manufacturing Goes Capitalist*, N.Y. TIMES, Aug. 22, 2001, at A8.

⁹ Forney, *supra* note 1.

¹⁰ The only labor organizations permitted in China are those recognized by the Communist Party.

¹¹ See HUMAN RIGHTS WATCH, CHINA HUMAN RIGHTS UPDATE, at <http://www.hrw.org/campaigns/china-99/china-update.htm> (Feb. 2000) [hereinafter HUMAN RIGHTS UPDATE].

¹² See Joe McDonald, *China Action Against Labor Protests Cited*, CHI. TRIB., Aug. 2, 2002, at 3.

¹³ Forney & Gough, *supra* note 6.

Congress to protect the mill's workers against the loss of basic living expenses.¹⁴ These examples are by no means extraordinary.¹⁵

Chinese workers are in dire need of a way to protect themselves against market reform and their government. Permitting the workers to form independent trade unions and bargain collectively is one form of protection. Recognition of these rights by the Communist Party would serve to quell the rising incidences of labor unrest that have become so common throughout China.¹⁶ Once these rights are recognized, Chinese workers will no longer need to resort to protests, demonstrations, and strikes because they will have an alternative means of combating the market forces that threaten them. Interestingly, as a member of the International Labour Organization ("ILO"), China is obligated to recognize certain rights considered to be fundamental to the existence of every human being.¹⁷ The fundamental rights are: "freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation."¹⁸ ILO member countries recognize these rights by adopting various conventions, recommendations, and declarations. Since the ILO member states adopted the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, the recognition of the four core fundamental rights is required by all ILO members.

This paper argues that ratification and enforcement of key ILO labor conventions recognizing the rights of freedom of association and collective bargaining will help ease China's transition to a market economy. The principles promulgated by the conventions have been developed by the ILO for unilateral implementation throughout the world and are regarded by all member countries as fundamental to every worker's existence.¹⁹ This paper argues for Chinese implementation of labor protections in four ILO documents: the ILO Declaration on Fundamental Principles and Rights at

¹⁴ HUMAN RIGHTS WATCH, CHINA: LABOR RIGHTS VIOLATED DESPITE NEW TREATY (Mar. 16, 2001), available at <http://www.hrw.org/press/2001/03/chinalabor.htm> [hereinafter LABOR RIGHTS VIOLATED].

¹⁵ See *Granting Permanent Normal Trade Relations (NTR) Status to China: Is It in the U.S. National Interest?: Hearing Before the House Comm. on Int'l Relations*, 106th Cong. 33-35 (2000) (testimony of Mike Jendrzejczyk, Washington Director, House Comm. on Int'l Relations) [hereinafter Testimony of Mike Jendrzejczyk].

¹⁶ See *id.*

¹⁷ ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233, 1237-38 (1998), available at <http://www.ilo.org/public/english/standards/decl/declaration/text/tindex.htm>.

¹⁸ *Id.*

¹⁹ ILO, Characteristics of International Labor Standards, at <http://www.ilo.org/public/english/standards/norm/whatare/charact/index.htm> (last visited Jan. 29, 2004).

Work; the International Convention on Economic, Social and Cultural Rights ("ICESCR"); the Convention Concerning Freedom of Association and Protection of the Right to Organise; and the Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. Section II examines China's recent and rapid transition to a socialist market economy. Section III discusses several problems created for China's working class by the reforms. Section IV describes Chinese labor law and argues that China's only recognized union, the ACFTU, does little to help China's workers and is nothing more than an organ of the Communist Party. Section V discusses China's increasing but limited involvement with the ILO. Section VI argues that ratification and enforcement of the ILO conventions, thereby recognizing the basic labor rights of Chinese workers to form and join independent trade unions and collective bargaining, will ease China's transition to a socialist market economy. Section VII concludes by demonstrating how Chinese workers will benefit from government recognition of their rights.

II. China's Transition to a Socialist Market Economy

A. History of Reforms

Over the past two decades China has been transforming its rigid, centralized state-planned economy into one that is market-oriented and specifically tailored to attract foreign investment. The official goal is for China to become a "socialist market economy."²⁰ To accomplish this goal China is making drastic changes in its statist ideology by introducing new forms of business organization, deregulating capital flows, and liberalizing trade.²¹

Prior to the 1970s, China was a state-planned economy and had little interest in Western economic institutions.²² The Chinese government, under Chairman Mao Zedong, set up quotas for agricultural and industrial output, provided the Chinese with a cradle-to-grave employment guarantee, and did not concern itself with supply and demand.²³ It was believed the quotas would improve China's production, allowing it to surpass Great Britain in ten years and the United States in twenty-five years. The reality

²⁰ Fan Gang, *China's "Dual-Track Transition" Toward the Market: Achievements and Problems*, Aug. 1994, at <http://www.1990institute.org/publications/pubs/ISUPAP9.html> (last updated Oct. 20, 2000).

²¹ See Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL'Y J. 365, 365 (1999).

²² Greg Mastel, *China and the World Trade Organization: Moving Forward Without Sliding Backward*, 31 LAW & POL'Y INT'L BUS. 981, 982 (2000).

²³ See Forney, *supra* note 1.

was that the country was left in shambles.²⁴ To provide a lifelong job to every one of its workers the government had to maintain a state monopoly over industry. This afforded the government the necessary control to manage not only the workers livelihoods but also forced dependency on the ruling communist party.

Realizing the failure of the state-planned system and tired of decades of revolutions, Deng Xiaoping commenced major economic reforms in 1979.²⁵ Deng Xiaoping's famous saying, "Whether a cat is black or white makes no difference. As long as it catches mice, it is a good cat" aptly captures the reasoning for capitalist reforms.²⁶ Just three years later, in 1982, China adopted its current Constitution which "for the first time incorporated an article allowing direct foreign investment."²⁷ With these reforms, China began to look for international investment which was in stark contrast to the state-planned system.²⁸ Now the markets, not the government, determine the direction of the economy.

China is redefining what it means to be a "communist in an increasingly capitalistic economy."²⁹ Since 1979 it has been introducing economic reforms designed to maintain its communist party primacy.³⁰ A primary reason for the reforms is the communist party's belief that it cannot maintain control and legitimacy without economic gains.³¹ For example, China's real per capita GNP grew 7.2 percent each year from 1978 to 1990.³² Of particular interest is the 9.7 percent growth rate between 1982 and 1988 that came to a grinding halt in 1989 as a result of the political

²⁴ See BBC News, *Great Leap Forward*, at http://news.bbc.co.uk/1/hi/english/static/special_report/1999/09/99/china_50/great.htm (Oct. 6, 1999) (discussing the catastrophic effects of turning farmland into factories during the Great Leap Forward causing 20 million people to die of starvation).

²⁵ See Chan & Senser, *supra* note 2, at 104, 104; see also Gang, *supra* note 20.

²⁶ Cable News Network, *Reformer with an Iron Fist*, at <http://www.cnn.com/SPECIALS/1999/china.50/inside.china/profiles/deng.xiaoping/> (last visited Jan. 28, 2004). This saying implies that the type of economy China had did not matter as long as it helped the country prosper.

²⁷ Mark B. Baker, *Forgotten Legal China*, 17 Hous. J. Int'l L. 363, 365 (1995); XIANFA [Constitution] art. 18 (1982) (P.R.C.).

²⁸ David Blumental, "Reform" or "Opening"? *Reform of China's State-Owned Enterprises and WTO Accession - The Dilemma of Applying GATT to Marketizing Economies*, 16 UCLA PAC. BASIN L. J. 198, 205 (1998).

²⁹ Ted Anthony, *Communists Try to Soothe Angry Workers*, USA TODAY, Nov. 12, 2002, at 14A.

³⁰ See *id.*

³¹ See *id.*

³² U.S. DEPT. OF STATE, BACKGROUND NOTE: CHINA (Mar. 2004), available at <http://www.state.gov/r/pa/ei/bgn/18902.htm> [hereinafter BACKGROUND NOTE].

crisis surrounding Tiananmen Square but then quickly resumed in 1991.³³ The economy has since showed gains of seven to nine percent each year since 1991.³⁴ In fact, of countries making the switch from a planned economy to a market economy, China is the only country to have not suffered large-scale social chaos and economic disorder.³⁵ Key reforms that have contributed to China's success include the entry of non-state firms, an increase in competition among both state firms and non-state firms, and the improved performance of state owned enterprises.³⁶

Since its accession to the World Trade Organization ("WTO") in December of 2001,³⁷ the opening of China's borders to outside investment has become "all around, multi-level and much broader" than before.³⁸ Entry into the WTO has been a pivotal point in China's transition because it represents a major step towards a market-driven economy and will undoubtedly lead to a stronger business environment throughout the country in the long-run.³⁹

China's entry into the WTO, however, also marks the beginning of the most dangerous phase of its transition yet.⁴⁰ By committing to the WTO, China has agreed to follow WTO rules that will effectively lower trade barriers.⁴¹ This "means more foreign competition pressuring China's most vulnerable industries, such as the country's steel smelters, coal producers and 120 carmakers."⁴² For example, Chinese farmers who have spent a lifetime planting crops for the state are forced to compete with the mechanized agro-businesses of the U.S.⁴³ Many cannot compete. Farmers like Li Dianjun, a former corn farmer who must now pedal a tricycle-like rickshaw in a nearby city to earn just two dollars in a ten-hour day, are

³³ *Id.*

³⁴ *Id.*

³⁵ Gang, *supra* note 20. Russia and eastern European countries have suffered large scale social and economic disorder due to their economic reforms.

³⁶ John McMillan & Barry Naughton, *How to Reform a Planned Economy: Lessons from China*, 8 OXFORD REV. ECON. POL'Y, 130, 131 (1992).

³⁷ WTO, Protocols of Accession for New Members Since 1995, Including Commitments in Goods and Services, at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#chn (Apr. 2004).

³⁸ Embassy of the People's Republic of China in the United States of America, *Minister: Five Positive Changes for China's Opening to Outside World*, at <http://www.china-embassy.org/eng/zt/wto/t36964.htm> (Nov. 13, 2002).

³⁹ Cable News Network, *China Embarks on Historic, Difficult Market Transformation* (Sept. 20, 2000), at <http://www.cnn.com/2000/ASIANOW/east/09/20/china.wto/>.

⁴⁰ Forney, *supra* note 1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

moving to the cities to find work.⁴⁴ He explained that if he “couldn’t work in the city, [his] family would go under.”⁴⁵ Tens of millions of migrants are moving from the Chinese countryside to the coasts to work in factories and are “willing to work [twelve] hours a day or more for a pittance, living [twelve] to a room and putting aside any questions about legal rights.”⁴⁶ In fact, it has been predicted that 150 million farmers will move to the cities to look for work within the next ten years – a migration larger than the entire U.S. workforce.⁴⁷ This increase in competition, added to the fact that workers in the cities are also losing jobs, leaves the Chinese working class in a difficult position.⁴⁸ WTO accession is not going to help their livelihood in the short run, but failure to join will also not help.⁴⁹

B. Effects of Reforms

Since implementing the first reforms towards adopting a market-style economy, China’s government is now faced with the difficult task of controlling the effects. The reforms have brought many changes: peasants are now permitted to produce according to demand thereby dissolving the hold of the commune, foreign and private factories have been set up in special economic zones to produce for export, and foreign investment has been allowed to pour in.⁵⁰ The results of these reforms are clear. Agricultural production shot up, and China quickly became one of the world’s largest exporters.⁵¹ But, for all of the new factories and investment that China has gained, it has had to shut down nearly half of its state-owned enterprises. In 1989, China had 102,300 state-owned and operated facilities; in 2001 there were just 46,800 with expectations for further

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Erik Eckholm, *Workers’ Rights Are Suffering in China as Manufacturing Goes Capitalist*, N.Y. TIMES, Aug. 22, 2001, at A8.

⁴⁷ Forney, *supra* note 1.

⁴⁸ The urban unemployment rate remains at a growing 8 to 9% because of continued layoffs. *Id.* Reliable national unemployment figures are not available. *Id.* There are estimates of at least 19 million Chinese out of work with tens of millions unaccounted for by Chinese Labor Department statisticians. *Id.*

⁴⁹ John Pomfret, *China Reports Big Surge in Labor Unrest During 1999 Disputes Over Unpaid Pensions, Wages, Fraud*, S.F. CHRON., Apr. 24, 2000, at A12.

⁵⁰ Steve Schifferes, *China: 50 Years of Communism: The Economy’s Long March*, BBC News (Sept. 29 1999), at http://news.bbc.co.uk/1/hi/special_report/1999/09/99/china_50_years_of_communist/453330.stm.

⁵¹ *Id.*

closings.⁵² The state-owned enterprises that have remained in business have been forced to streamline workforces and compete with the expanding number of foreign and private firms in China. Due largely in part to these closings China has experienced an uncontrollable rise in worker protests, unemployment, and poverty.⁵³

As a Communist country, with its history of disastrous revolutions,⁵⁴ China greatly values stability or at least the appearance of stability. While the Communist Party's core values have not changed throughout the past two decades of reforms, its economic composition is undergoing dramatic changes. The market reforms have facilitated the emergence of an economic class structure within China. The rich are getting richer while the poor are getting poorer.⁵⁵ Chinese citizens are growing increasingly affluent and now want a say in how their government runs their country.⁵⁶ This poses a challenge to the controlling Communist Party. As the ranks of well-to-do citizens grow at an astonishing rate they will eventually be able to demand changes in how China is governed.⁵⁷

C. China's Reaction to the Effects of Reforms

The Chinese government has addressed the effects of the market reforms by expanding its communist representation and injecting billions of dollars into its economy. The Communist Party recognizes its need to adapt to China's changing economic composition and has decided to admit representatives of the emerging middle class to the Communist Party. The government has also responded to the reforms' effects by pumping billions of dollars into infrastructure improvements. It is hoped that this priming of the economy will sustain both China's economic growth and the Communist Party's control.

⁵² *No Slowdown for China*, *supra* note 4 (Over this same time period the number of private firms operating in China increased from 90,000 to over 2 million.).

⁵³ See Cable News Network, *China Rejects U.N. Labor Criticism* (May 17, 2001), at <http://www.cnn.com/2001/WORLD/asiapcf/east/05/17/china.un.labor/index.html>.

⁵⁴ BACKGROUND NOTE, *supra* note 32. In 1958 Mao Zedong implemented a new economic program called the "Great Leap Forward." This program was an attempt to restructure China's economy and raise industrial and agricultural production. As part of the restructuring, giant agricultural cooperatives or communes and "backyard factories" sprouted throughout China. However, the program greatly disturbed normal market mechanisms and encouraged the production of poor and useless goods. Famine resulted and nearly 30 million Chinese died from starvation. Matthew White, *Twentieth Century Atlas - Most Evil Dictator*, at <http://users.erols.com/mwhite28/tyrants.htm> (last updated Sept. 1999).

⁵⁵ David J. Lynch, *Emerging Middle Class Reshaping China*, USA TODAY, Nov. 11, 2002, at 13A.

⁵⁶ *See id.*

⁵⁷ *Id.*

The current consensus among China watchers is that “it has lost its ideological soul and that it is now groping for new ways to justify its monopoly on power.”⁵⁸ Before the transition, ambitious Chinese would seek out membership in the Communist Party. Nowadays, being a member of the Communist Party is no longer essential to economic success.⁵⁹ China is a country where *guanxi*, or personal connections, “often matter more than formal regulations.”⁶⁰ Party membership still has its privileges and can help to speed up the bureaucratic process for aspiring entrepreneurs, but it is no longer a necessary component for success.⁶¹

The Communist Party no longer represents only the proletariat; it must now represent an emerging class structure. The introduction of market forces into China’s economy has created a middle class of citizens who are educated and wealthy. To appease this emerging affluence, the Communist Party has decided to admit representatives of China’s middle class under the “Three Represents Theory.”⁶² The “Three Represents Theory,” issued by Jiang Zemin, the Communist Party’s General Secretary, in February of 2000, emphasizes that the “Communist Party . . . represents advanced productivity, advanced culture and the fundamental interests of the overwhelming majority of the people of China.”⁶³ Calling for the admission of representatives of China’s middle class to the Communist Party is a doctrinal shift from traditional Marxist theory that communism, in its purist sense, is supposed to represent only the proletariat.⁶⁴

Lacking in this change is representation of China’s working class. “In China, workers are pitted against a Communist party that refuses to acknowledge . . . they have any rights as individuals.”⁶⁵ While the emerging affluent are getting more representation within the Communist Party, it appears the working class is getting less. “[T]he best chance [the] oppressed [working class] Chinese have for greater freedom lies in global economic advances that will lift more of them into the middle class and gain them greater political influence and power.”⁶⁶ This is probably not

⁵⁸ Erik Eckholm, *As China’s Economy Shines, the Party Line Loses Luster*, N.Y. TIMES, Nov. 4, 2002, at A1.

⁵⁹ Lynch, *supra* note 55.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Chi Hung Kwan, “Three Represents Theory” Aims for “Peaceful Evolution”, Research Institute of Economy, Trade, and Industry, at [http:// www.rieti.go.jp/en/china/02082301.html](http://www.rieti.go.jp/en/china/02082301.html) (Aug. 23, 2003).

⁶⁴ *See id.*

⁶⁵ George Melloan, *Workers of the World Are Shedding Their Chains*, WALL ST. J., Sep. 3, 2002, at A21.

⁶⁶ *Id.*

going to occur in the near future. Chinese workers have resorted to protests to combat their discontent. Individualized protests have been occurring with greater frequency in China than ever before.⁶⁷ Recent labor statistics show a jump from 8,150 labor disputes in 1992 to over 120,000 in 1998.⁶⁸ In 2000 there was a twelve percent increase to approximately 135,000 labor disputes.⁶⁹ These disputes have come in the wake of many closings of China's state run enterprises resulting in widespread layoffs. The closings are an effect of China's economic reforms.

The dilemma for China's ruling Communist Party is that it must keep the economy booming at its current seven percent annual growth rate so that it may retain its political control throughout the treacherous economic transition.⁷⁰ As long as the Communist Party keeps the growth rate high and the growing middle class happy its iron control of politics will not be challenged. "Chinese leaders know that most revolutions occur when rising expectations are disappointed."⁷¹ As such, China's Communist Party is doing everything it can to maintain its rapid economic growth. For example, in the next decade China is projected to spend nearly \$200 billion on substantial infrastructure projects in the city of Chongqing.⁷²

III. Problems for China's Working Class

A. Problems

China's transition to a market economy has exposed a multitude of problems within China's infrastructure. The transition has been largely successful;⁷³ however, it has also created significant problems for China's working class. One specific problem is that China's labor force is now exposed to "indirect transnational competition in capital and product markets."⁷⁴ Chinese workers are experiencing a whole new array of international and domestic competition in the form of massive entry of private firms, an increase in competition among state-run firms and non-

⁶⁷ See Erik Eckholm, *A Mining Town's Sullen Peace Masks the Bitter Legacy of China's Labor Strategy*, N.Y. TIMES, Apr. 14, 2002, §1, at 8.

⁶⁸ Pomfret, *supra* note 49.

⁶⁹ Forney, *supra* note 1.

⁷⁰ Lynch, *supra* note 55.

⁷¹ *Id.*

⁷² See Joseph Kahn, *China Gambles on Big Projects for Its Stability*, N.Y. TIMES, Jan. 13, 2003, at A1 (The projects include the building of superhighways, railways, airports, subways, and dams.).

⁷³ McMillan & Naughton, *supra* note 36, at 131.

⁷⁴ Cooney, *supra* note 21, at 366.

state firms, and increased efficiency of state-owned firms due to the introduction of market forces.⁷⁵ Workers have no way to protect themselves against these market forces because China does not afford basic labor rights to its citizens. For instance, Chinese law does not provide for the right to strike and bans independent labor unions. The question then arises: What is the Chinese working class to do?

1. Unemployment

The unemployment situation for China's working class is going to worsen as China speeds up bankruptcies of its state run enterprises, an effect of the transition to a market economy.⁷⁶ The government believes this modernization process is necessary for the economy to raise tens of millions out of poverty.⁷⁷ The very process that is supposed to be benefiting China's working class in the long run, however, is killing them in the short run. The workers have no say in their government's actions and no power to combat the lurking market forces threatening to put them out of work indefinitely.

China has embraced a market-economy; yet it has not been willing to give many of its citizens the means to prosper in the new economy.⁷⁸ China is cracking down on its citizens' rights of free expression, freedom of religion, and freedom of association with greater frequency than ever before.⁷⁹ Leaders of worker and peasant protests calling for worker rights are routinely detained.⁸⁰ Those trying "to organize workers, or protesting against exorbitant fees and taxes, endemic corruption or fixed local elections have been arrested and given sentences of up to ten years."⁸¹ The protestors are usually arrested and charged for endangering state security and detained or sent to labor camps for an undetermined period of time where they are "reeducated" and released.⁸² The wide range of this crackdown "suggests that a nationally coordinated campaign is underway to shut down all peaceful opposition in the name of maintaining 'social stability.'"⁸³

⁷⁵ McMillan & Naughton, *supra* note 36, at 131.

⁷⁶ Anthony, *supra* note 29.

⁷⁷ *Id.*

⁷⁸ See HUMAN RIGHTS UPDATE, *supra* note 11.

⁷⁹ Testimony of Mike Jendrzejczyk, *supra* note 15.

⁸⁰ HUMAN RIGHTS UPDATE, *supra* note 11.

⁸¹ *Id.*

⁸² See HUMAN RIGHTS WATCH, CHINA: WORKERS' RIGHTS LAG BEHIND U.N. STANDARDS (Feb. 28, 2001), available at <http://www.hrw.org/press/2001/03/chinacovenant.htm> [hereinafter WORKERS' RIGHTS LAG BEHIND].

⁸³ Testimony of Mike Jendrzejczyk, *supra* note 15.

2. Change in Work Environment

Since the commencement of free market-type reforms Chinese workers have experienced a gradual change in many aspects of the workplace. These changes have most notably affected worker rights, employment security, and the bargaining power of workers. The introduction of free-market forces has significantly deteriorated the power of the common worker and created a workplace where the distribution of power is clearly lopsided in favor of the management.

Traditionally, under China's state-planned economy all workers were employed by the state.⁸⁴ State-run enterprises offered a relatively high degree of rights, job security, and bargaining power.⁸⁵ Factories produced not for profit, but instead to satisfy government quotas.⁸⁶ The government had complete control over the workplace.⁸⁷ Society's "needs were determined by the [communist] central planning committee which set production targets, allocated the necessary raw materials, and determined the price of the final product."⁸⁸ In fact, the workers were portrayed as the official masters of the Communist nation.⁸⁹ The government "protected workers' rights and prevented arbitrary and unfair treatment of workers."⁹⁰ Generally speaking, this was accomplished by effectively eliminating profit motives in exchange for the security of all workers and adding to the country's stability. The autonomy and flexibility of management to make profit-maximizing decisions was greatly limited. Therefore, there was no need for management to exploit workers and outperform competitors because there were none. Managers relied and depended on the workers for professional success because they were held accountable for reaching government created production quotas.⁹¹ Thus, managers were often forced to compromise with the workers to reach the state set quotas.⁹² Profit and demand were not important considerations. Prior to the reforms China's

⁸⁴ See Dong Baohua, Labor Law and Reform in China, Paper presented at the International Labor Standards Conference, Stanford Law School (May 19-21, 2002) (preliminary draft translated by Li Lingyum).

⁸⁵ See Wenfang Tang & William L. Parish, *Chinese Labor Relations in a Changing Work Environment*, 5 J. CONTEMP. CHINA 367 (1996), available at www.pitt.edu/~tang/written/articles/worker.htm.

⁸⁶ *Id.*

⁸⁷ See *id.*

⁸⁸ *Id.*

⁸⁹ Eckholm, *supra* note 46.

⁹⁰ Tang, *supra* note 85.

⁹¹ See *id.*

⁹² See *id.*

economy was inefficient and favored the common worker who would be provided for regardless of their skill, intelligence, or efficiency.⁹³

Since the reforms, however, production is determined by demand and profit is now an important consideration. Managers are now faced with difficult personnel decisions due to an increased push for efficiency and productivity. Gone are the days where the government provided cradle to grave security for all hard working individuals. This change in economies has eroded nearly all forms of protection previously enjoyed by Chinese workers. To once again balance the powers in the workplace, Chinese workers need the right to organize and collectively bargain.

3. Labor Unrest

China's state-owned enterprises are falling victim to market forces and being shut down because they are unable to remain profitable. The Labor Ministry estimated in 2000 that eleven million Chinese workers would be unemployed by the end of the year.⁹⁴ Consequently, labor unrest in China is growing at a record pace thus creating more instability.⁹⁵ Reports of violent protests have been reported throughout the country. The protests have not just been because of the large numbers of layoffs from state-owned enterprises either, but also over unpaid wages, stipends, pensions, and corruption.

Conditions in China are becoming so poor, Chinese workers are resorting to wildcat strikes, protests, and factory sit-ins. Instead of instantly making arrests, the government has made attempts to keep the protestors and demonstrators at bay. So far the Communist Party has been largely successful in fending off broad, wide ranging protests and strikes.⁹⁶ The general strategy has been to give in to most of the workers' demands and to place the blame for the local protests on the local officials.⁹⁷ It is a "carrot-and-stick strategy--placate the workers, jail the organizers," and blame the local authorities and so far it seems to have served as an effective deterrent.⁹⁸ This way, the Communist Party enters a potentially disastrous situation as a champion of the masses.⁹⁹

⁹³ *See id.*

⁹⁴ Pomfret, *supra* note 49.

⁹⁵ *See* Testimony of Mike Jendrzejczyk, *supra* note 15.

⁹⁶ Eckholm, *supra* note 67.

⁹⁷ *Id.*

⁹⁸ Forney, *supra* note 1.

⁹⁹ Eckholm, *supra* note 67

4. China's Political Dilemma; What is the Proper Approach to Labor Unrest?

This new onslaught of labor unrest puts the Chinese government in a real dilemma.¹⁰⁰ If they repress the protests, they risk the possibility that they will become more frequent and violent. Alternatively, if they react generously, by giving into the protestors' demands, they also risk more protests. China has responded by walking the middle ground: making a few arrests, banning news reports to prevent widespread recognition, and making quick concessions to the majority of the protestors.¹⁰¹ This approach has been successful in preventing a chain reaction of protests across the country. Yet, in light of the government's containment of the protests, there is a growing trend of "widespread contempt for the Communist Party, a spreading realization that protests can bring results, and [a] continued feeling of vulnerability among millions of idle workers."¹⁰²

IV. Labor Law in China and the ACFTU

A. Chinese Labor Law

As China continues to move toward a socialist market economy, its workers' rights to organize and bargain collectively need to be "strengthened and elaborated."¹⁰³ The Constitution of the People's Republic of China guarantees to everyone the right to organize.¹⁰⁴ According to Article 35 of the Constitution, "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."¹⁰⁵ This has been interpreted under PRC law to mean that citizens are free to organize and join China's only state-sponsored union, the All China Federation of Labor Unions ("ACFTU").¹⁰⁶ Workers wishing to organize and establish workers' organizations are required to obtain prior authorization from the government. Specifically, Article 11 of the Trade Union Law of the PRC states, "The establishment of

¹⁰⁰ *See id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ The American Embassy in China, On Enacting Legislation on Unfair Labor Practices, at <http://www.usembassy-china.org.cn/english/sandt/labor-rights.html> (last visited May 12, 2004) (summarizing Chang Kai, *The Necessity of and Prospects for Chinese Legislation on Unfair Labor Practices*, SOC. SCI. IN CHINA, Sept. 2000, at 71, 74-76).

¹⁰⁴ XIANFA [Constitution] art. 17 (1982) (P.R.C.).

¹⁰⁵ *Id.* art. 35.

¹⁰⁶ *See* The American Embassy in China, *supra* note 103.

basic-level trade union organizations, local trade union federations, and national or local industrial trade union organizations shall be submitted to the trade union organization at the next higher level [the ACFTU] for approval.”¹⁰⁷

B. The ACFTU

Government officials believe the country’s sole union, the ACFTU, adequately represents the interests of the Chinese working class.¹⁰⁸ China’s Foreign Ministry has publicly stated that “Chinese law safeguards the rights of Chinese workers”¹⁰⁹ so much that in March of 2000 China ratified the ICESCR only after omitting a key clause that would allow Chinese workers to form and join independent labor unions.¹¹⁰ However, the reality is that Chinese workers “are among the world’s most exploited, disorganized and disempowered workforces.”¹¹¹ Specific reasons for the ratification have not been expressed. However, a Chinese Foreign Ministry official cited “conditions in China” as a reason for the ratification of the treaty.¹¹² Interestingly, the ratification appeared to be timed to defend China against criticism of its human rights record at the U.N. annual human rights conference in March of 2001.¹¹³

China “allows only one labor union for reasons of history, the planned economy and the system of the centralization of state power.”¹¹⁴ The ACFTU is a government-sponsored union that represents over 590,000 official grassroots unions and their sub-branches throughout the country.¹¹⁵ The Chinese government systematically crushes all attempts to organize independent unions.¹¹⁶ The ACFTU is completely controlled by the Chinese government and is often seen as an organ of the party-state

¹⁰⁷ TRADE UNION LAW OF THE PEOPLE’S REPUBLIC OF CHINA art. 11 (amended Oct. 27, 2001), at <http://www.acftu.org.cn/unionlaw.htm> (last modified May 10, 2004).

¹⁰⁸ See *China Agrees to Cooperate with ILO on Promoting Labor Rights*, Associated Foreign Press, May 17, 2001, available at <http://www.hartford-hwp.com/archives/55/165.htm>.

¹⁰⁹ Cable News Network, *China Ditches Key Clause in Labor Treaty* (Mar. 1, 2001), at www.cnn.com/2001/WORLD/asiapcf/east/03/01/china.treaty/index.html (quoting Chinese Foreign Ministry spokesperson Zhang Qiyue) [hereinafter *China Ditches Key Clause*].

¹¹⁰ *Id.*

¹¹¹ Trini Leung, *ACFTU and Union Organizing*, CHINA LAB. BULL., Apr. 26, 2002, available at http://www.china-labour.org.hk/iso/article.adp?article_id=2265.

¹¹² *China Ditches Key Clause*, *supra* note 110.

¹¹³ *Id.*

¹¹⁴ The American Embassy in China, *supra* note 103.

¹¹⁵ WORKERS’ RIGHTS LAG BEHIND, *supra* note 82.

¹¹⁶ *Id.*

machinery.¹¹⁷ This means that it exists to further the ideals of the Communist Party and cannot act in any way unless the actions have been directed or approved by the Party.¹¹⁸ It has a declared membership of over 120 million workers and claims to be the world's largest labor organization.¹¹⁹ This statistic is misleading because most of the 120 million members were employees of China's state-run enterprises where membership in the ACFTU is required. As of 1998, the private sector, which is expanding at meteorological rates, is only four percent unionized while only 7.3 percent of the non-collectively owned enterprises were unionized.¹²⁰ Accordingly, a vast majority of the ACFTU's membership is in need of union protection more than ever because of the recent closing and phasing out of so many state-run enterprises due to China's economic reforms.

In reality the ACFTU does not represent the interests of Chinese workers. Instead, it has a statutory obligation to uphold the leadership of the Chinese Communist Party¹²¹ and is prohibited from striking over disputes. There is a growing distrust of the ACFTU among the Chinese people due to its inefficiency and lack of willingness to sponsor or lead strikes against the government in the interest of workers.¹²² As a result, when Chinese workers choose to organize they will not go to the ACFTU for help.¹²³ Instead, the workers stage mass protests and wildcat strikes¹²⁴ such as when "over 80,000 petroleum and metal workers staged mass street demonstrations in Daqing and Liaoying" in March and April of 2002 or the "two month-long struggle waged by 50,000 workers from the Daqing Oilfield who formed their own union body."¹²⁵ The clandestine union formed was known as the Daqing Retrenched Workers' Provisional Union

¹¹⁷ Leung, *supra* note 112.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ The American Embassy in China, *supra* note 103.

¹²¹ International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied Workers' Associations (IUF), *Confusion at the ILO? China's Government Elected to Governing Body as ...Worker Delegate* (June 19, 2002), available at <http://hartford-hwp.com/archives/55/293/html>.

¹²² See John Chen, *China and the ILO: Formal Cooperation Masks Rejection of Key Labour Rights*, ASIAN LAB. UPDATE, July-Sept. 2002, available at www.amrc.org.hk/4401.htm.

¹²³ See Leung, *supra* note 112.

¹²⁴ A "wildcat strike" is a strike that is not authorized by a union or in violation of a collective bargaining agreement.

¹²⁵ Leung, *supra* note 112.

Committee and was the first successful independent union organizing effort since the 1990s; a rare success story indeed.¹²⁶

The organization of labor unions independent of the ACFTU is strictly banned. Any person who attempts to organize an independent labor union is dealt with quickly and severely. Those attempting to legally organize a non-government affiliated union under Chinese law must first receive authorization from the relevant government department.¹²⁷ If no authorization is acquired or granted, then the organizers and any participants risk arrest or being detained and “reeducated” at one of the many labor camps found throughout China. The Chinese government will not hesitate to dissolve an organization that even remotely appears to be a threat to the party’s monopolistic control of social organizations or to the nation’s stability. A recent example is the 1999 crackdown on the Falun Gong movement in China. Falun Gong was a loosely organized meditation and exercise organization¹²⁸ which the Chinese labeled a “heretical cult.”¹²⁹ By utilizing such a label, the government was able to claim that the “intensifying censorship and crackdown on practitioners was legal.”¹³⁰

V. China’s Increasing But Limited Partnership with the ILO

A. The ILO

The ILO has 175 member states and has promulgated over 180 binding conventions and 185 recommendations.¹³¹ Its labor standards are universal in character and developed with the goal of ratification and implementation of all countries “regardless of each’s stage of economic development, or social or economic system.”¹³² The labor standards promoted by the ILO consist of international labor conventions and recommendations. Conventions are binding treaties.¹³³ The intent of conventions and recommendations is to “have a concrete impact on working conditions and

¹²⁶ *Id.*

¹²⁷ HUMAN RIGHTS UPDATE, *supra* note 11.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ ILO, *supra* 106.

¹³² ILO, Characteristics of International Labour Standards, at www.ilo.org/public/english/standards/norm/whatare/charact/index.htm (last updated Oct. 20, 2000).

¹³³ Conventions are binding upon those member states that ratify them. Recommendations are non-binding instruments that deal with the same issues as conventions and are intended to set guidelines to foster and shape national policy and action. ILO, What Are International Labour Standards?, at <http://www.ilo.org/public/english/standards/norm/whatare/index.htm> (last updated Oct. 20, 2000).

practices in every country of the world.”¹³⁴ The ILO also promotes international labor rights through other, less formal, documents such as codes of conduct, resolutions and declarations. These documents are intended to have a normative effect and are not part of the ILO’s system of international labor standards. A major goal of the ILO is to prevent competition among countries based upon labor standards.¹³⁵ Through its conventions and recommendations it has significantly impacted the lives of workers throughout the world, particularly in the member states who have ratified such documents.

The ILO has made substantial progress in obtaining global support for basic international labor standards and in promoting compliance with the standards.¹³⁶ Furthermore, “[d]uring the past decade a strong international consensus has emerged that freedom of association and collective bargaining should be accepted by the world community as fundamental human rights.”¹³⁷ As a result of the international consensus, the ILO has been highly successful in gaining commitment to its fundamental rights.¹³⁸ Consequently, the number of countries that have ratified all the ILO core labor standards has more than doubled since 1995.¹³⁹ To date, China has not ratified all of the core labor standards, specifically the rights to freedom of association and to collective bargaining.¹⁴⁰

While the “idea” of adopting minimum labor standards or the ILO core labor principles has been widely accepted, problems arise in the actual enforcement of those ideas. The ILO does not have the means to enforce its conventions.¹⁴¹ The capacity of the ILO to make constructive contributions to the enforcement of its labor standards is inhibited by its representational

¹³⁴ *Id.*

¹³⁵ Christopher L. Erickson & Daniel J.B. Mitchell, *Labor Standards and Trade Agreements: U.S. Experience*, 19 COMP. LAB. L. & POL’Y J. 145, 148-49 (1998).

¹³⁶ Sarah H. Cleveland, *Why International Labor Standards?*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 129, 130 (Robert J. Flanagan & William B. Gould IV eds., 2003).

¹³⁷ ROY J. ADAMS, ASSESSING THE EXTENT OF FREEDOM OF ASSOCIATION AND THE EFFECTIVE RIGHT TO BARGAIN COLLECTIVELY IN LIGHT OF GLOBAL DEVELOPMENTS 1 (ILO, Working Papers), at <http://www.ilo.org/public/english/standards/decl/vaw/pdf/papers/adams.pdf> (last updated June 2, 2000).

¹³⁸ See Cleveland, *supra* note 137, at 130, 136.

¹³⁹ ORG. FOR ECON. COOPERATION AND DEV., INTERNATIONAL TRADE AND CORE LABOUR STANDARDS 9 (2000)[hereinafter OECD].

¹⁴⁰ ILO, The ILO in China, at <http://www.ilo.org/public/english/region/asro/beijing/inchina.htm> (last visited May 8, 2004).

¹⁴¹ Robert J.S. Ross & Anita Chan, Reframing the Issue of Globalization and Labor Rights 22 (2002) (revised from a presentation given at the Political Economy of World Systems 2002 Conference, University of California at Riverside), available at <http://irows.ucr.edu/conferences/pews02/ppross.doc> (last visited Feb. 21, 2004).

structures, cumbersome procedures, and superficial monitoring system.¹⁴² In other words, the ILO has become a relatively ineffective mechanism of enforcement and does not have the authority or capability to enforce its rules.¹⁴³ This, however, should not be a problem in China's case because it has incentives for enforcing key labor rights. By quelling the effect of market forces on the working class, the recognition and enforcement of Chinese workers' ILO fundamental rights of freedom of association and collective bargaining will make China's transition easier.

Labor relations throughout the world are being profoundly altered and China is not keeping pace.¹⁴⁴ Worldwide recognition of this set of core labor rights is supported by the Organization for Economic Cooperation and Development ("OECD"), the WTO, the ILO, and the United Nations ("U.N.").¹⁴⁵ These standards were created to encourage higher wages and increase productivity.¹⁴⁶ These standards coincide with China's reasons for transitioning to a market economy, but to date, China has not ratified key ILO Labor Conventions allowing workers to join free and independent labor unions, bargain collectively, strike, or be free from forced labor. In time, this lack of regulation and stability within China's labor market will have negative long-term effects on its economy. The ratification and enforcement of these key labor conventions will give the Chinese working class a means of protection against the introduction of market forces into the Chinese economy. It will also benefit the Chinese government by curtailing labor unrest among its citizens and adding to the stability of the country.

B. ILO Conventions, Covenants, and Declarations

1. ILO Declaration on Fundamental Principles and Rights at Work

An important document concerning the labor rights of workers was adopted by the ILO at the International Labor Conference in Geneva, Switzerland in 1998. The ILO adopted the ILO Declaration on Fundamental Principles and Rights at Work because many of its member states were failing or refusing to ratify key labor conventions and treaties.¹⁴⁷

¹⁴² See Cooney, *supra* note 21, at 381.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 365.

¹⁴⁵ Roy J. Adams, *Choice or Voice? Rethinking American Labor Policy in Light of the International Human Rights Consensus*, 5 EMPL. RTS. & EMPLOY. POL'Y J. 521, 522-23 (2001).

¹⁴⁶ Cleveland, *supra* note 137, at 136.

¹⁴⁷ Cf. ADAMS, *supra* note 138, at 4 (explaining that the liberalization of international trade created a debate between those who wanted to enforce trade sanctions on nations who

This Declaration states that “fundamental labour standards” apply to all ILO member states regardless of whether key conventions have been ratified. China, a member of the ILO since its inception in 1919, is obligated to recognize the fundamental rights of its workers pursuant to this Declaration. China voted in favor of the Declaration and to date still does not recognize rights to organize independent labor unions or collectively bargain.¹⁴⁸

2. International Convention on Economic, Social and Cultural Rights

In February of 2001 China ratified the ICSECR.¹⁴⁹ This human rights treaty contains key labor rights provisions allowing the formation of free and independent trade unions. However, China ratified the Convention only after excluding key labor rights provisions guaranteeing its citizens the right to form and join independent trade unions.¹⁵⁰ The Chinese government explained that the labor provisions were not necessary because “Chinese law safeguards the rights of Chinese workers” and rejecting the union clause “does not affect the various rights and interests that they [Chinese] enjoy in accordance with the law.”¹⁵¹

3. ILO Fundamental Labor Rights Conventions

China has also not ratified two other key ILO conventions.¹⁵² These conventions are considered by the 175 member countries to be so important to the existence of all workers throughout the world that they are fundamental to the rights of human beings at work and should be ratified by all member states of the ILO.¹⁵³ The conventions are the Convention Concerning Freedom of Association and Protection of the Right to

tolerated the suppression of core labor rights and those who feared the detrimental effect of such sanctions on developing nations).

¹⁴⁸ See Catherine Hollingsworth, *Commission on Labor Rights in China Urged to Monitor WTO Transition in Coming Months*, 19 INT'L TRADE REP. 542, 543 (2002).

¹⁴⁹ LABOR RIGHTS VIOLATED, *supra* note 14.

¹⁵⁰ Chen, *supra* note 123.

¹⁵¹ *China Ditches Key Clause*, *supra* note 110.

¹⁵² Chen, *supra* note 123.

¹⁵³ ILO, Fundamental ILO Conventions, at <http://www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm> (last updated Oct. 20, 2000).

Organize and the Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively.¹⁵⁴

The Convention Concerning Freedom of Association and Protection of the Right to Organize, adopted by the ILO in San Francisco in 1948, recognizes the rights of workers to form and join independent trade unions.¹⁵⁵ Article 2 of the Convention provides: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."¹⁵⁶ The Convention also provides for the autonomy of trade unions, keeping the organizations free from government influence. Specifically, Article 3 states that "[w]orkers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes."¹⁵⁷ Article 3 further states that "[t]he public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."¹⁵⁸

The Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, adopted in 1949 by the ILO, protects workers and their trade unions from acts of anti-union discrimination and government interference and provides for the right to collectively bargain the terms and condition of employment.¹⁵⁹ Specifically, Article 4 of the Convention states that "[m]easures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."¹⁶⁰ This Convention sets forth the basic requirement that trade unions be permitted to bargain terms and conditions of employment for its members.

¹⁵⁴ Convention Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087> [hereinafter Convention No. 87]; Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098> [hereinafter Convention No. 98].

¹⁵⁵ See Convention No. 87, *supra* note 155.

¹⁵⁶ *Id.* art. 2.

¹⁵⁷ *Id.* art. 3.

¹⁵⁸ *Id.* art. 3.

¹⁵⁹ See Convention No. 98, *supra* note 155, arts. 1-4.

¹⁶⁰ *Id.* art. 4.

Freedom of association, as defined by the ILO, means that "[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."¹⁶¹ In China, all social organizations that wish to hold gatherings or meetings, of which trade unions are included, are required to obtain permission from either the government or the ACFTU.¹⁶² According to ILO principles, these organizations not only have the right to meet and associate, they also have the right to collectively bargain.¹⁶³ Organizations formed according to these principals cannot be dissolved or suspended by outside authority such as the government.¹⁶⁴ The Chinese government dissolves any trade organization independent of the ACFTU.¹⁶⁵

Collective bargaining is defined by the ILO as all negotiations that take place between an employer and an employee organization that concerns working conditions, terms of employment, or labor relations.¹⁶⁶ This definition extends to situations where, in the absence of a union, workers are represented by delegates "duly elected and authorised by them in accordance with national laws and regulations."¹⁶⁷ Chinese law is not in

¹⁶¹ Freedom of Association and Protection of the Right to Organise Convention, July 9, 1948, art. 2, 68 U.N.T.S. 17, 20.

¹⁶² See Hilary K. Josephs, *Labor Law in a "Socialist Market Economy": The Case of China*, 33 COLUM. J. TRANSNAT'L L. 559, 571-572 (1995).

¹⁶³ ILO, *supra* note 17, ¶ 2(a).

¹⁶⁴ *Id.* ¶ 2(a); BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2000, ¶ A (2001), available at <http://www.humanrights-usa.net/reports/workersrights.html> (citing the ILO's definition of the "right of association" as the right of workers and employers "to be protected against dissolution or suspension by administrative authority.").

¹⁶⁵ See Cable News Network, *China Ratifies U.N. Workers' Rights Treaty* (Feb. 28, 2001), at <http://www.cnn.com/2001/WORLD/asiapcf/east/02/28/china.UN.ratify/index.html>

¹⁶⁶ The ILO's specific definition of collective bargaining is:[A]ll negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for: (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations. Convention Concerning the Promotion of Collective Bargaining, June 19, 1981, art. II, 1331 U.N.T.S. 267, 270, quoted in Bernard Gernigon et. al., *ILO Principles Concerning Collective Bargaining*, 139 INT'L LAB. REV. 33, 36 (2000).

¹⁶⁷ Collective Agreements Recommendation (No. 91), June 29, 1951, in ILO, CONVENTIONS AND RECOMMENDATIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE 1919-1966, at 802 (1966).

accordance with this definition. In China, all collective agreements must be submitted to the government for review and registration.¹⁶⁸

4. China's Recognition of ILO Conventions Protecting the Right to Organize and Bargain Collectively (or lack thereof)

China explains that it has not ratified many ILO Conventions and Recommendations because knowledge of the conventions was restricted to a small number of Chinese officials and their ratification would thus be ineffective and fruitless.¹⁶⁹ This reasoning was elaborated in 1989 at the International Labor Conference ("ILC"), the ILO's annual meeting held in Geneva, Switzerland. Chinese official Guan Jinghe announced that, "[S]ince China is a large country and only officials responsible for handling standards-related matters . . . grasp the significance of labour standards, it is not possible to meet with the requirement of extensive application of ILO Conventions and Recommendations."¹⁷⁰ Nevertheless, China stresses that it has a "positive attitude of cooperation" towards the ILO.¹⁷¹ However, this may not accurately reflect the reality of China's position in regards to labor rights and compliance with ILO conventions. Given the massive surge in labor protests and attempts to organize labor unions, it is apparent Chinese workers believe they should have these rights even though they are unaware ILO principles exist. Ironically, during the 1989 Democracy Movement, just after the Chinese announced its reason for not fully complying with the ILO, an independent Chinese group of workers "implicitly called for compliance with the standards of ILO conventions by demanding official recognition for these organisations" during protests.¹⁷²

Since the Tiananmen Square protests in June of 1989, the Chinese government has steadily increased its interest in the ILO and used the ILO as "an important international forum for the pursuit of national interests."¹⁷³ In 2000, China's labor minister, Zhang Zuoji, assured delegates to the ILC that:

The Chinese government is willing to strengthen its cooperation with the ILO and all of its members, to share and use for reference their experience in improving the construction of labour markets

¹⁶⁸ ILO, FREEDOM OF ASSOCIATION AND THE EFFECTIVE RECOGNITION OF THE RIGHT TO COLLECTIVE BARGAINING32 (Mar. 2000), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/d2-coll.pdf>.

¹⁶⁹ Chen, *supra* note 123.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

and the establishment of social security systems, in order to jointly promote the development of world labour insurance.¹⁷⁴

To date, China still does not recognize the rights of its workers to organize independent labor unions and bargain collectively nor has it made any substantial progress in this direction.

The ILO is geared towards having a humanitarian effect focusing on the individual worker's livelihood. While ratification of key ILO conventions will have a dramatic effect on China's workers it will also serve to ease China's transition to a socialist market economy. By ratifying the Convention Concerning Freedom of Association and Protections of the Right to Organize, the Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, the ILO Declaration on Fundamental Principles and Rights at Work, and the ICESCR (without exceptions) China will effectively recognize the rights of its people to organize and form independent trade unions and collective bargaining. By recognizing such rights China will experience effects that will ease its move to a market economy.

VI. Conclusions as to Why Recognition of Key ILO Labor Rights Will Ease China's Transition to a Socialist Market Economy

A. Why China Should Comply

China stands in a precarious position at this point in time because it is in the midst of revolutionary economic changes. Economic sanctions from the international community and their consequences could severely hinder China's transition by lowering its economic growth rate. It is unlikely that sanctions will result due to China's failure to recognize rights to organize and to bargain collectively. However, there are signs China is sensitive to the potentially devastating threats of economic consequences attached to widespread violations of its citizens' human rights and poor labor standards. This is particularly true in regards to the U.N. Commission on Human Rights (the "Commission"). Since a resolution accusing China of committing gross human rights violations came within one vote of passing in 1995, China has made a major worldwide effort to keep any critical resolution off the Commission's agenda by "threatening to cut off trade deals or investment opportunities to governments that might support action."¹⁷⁵ Recognition of its workers' freedom of association and

¹⁷⁴ *Id.*

¹⁷⁵ HUMAN RIGHTS WATCH, USE WTO PROCESS TO PUSH CHINA ON RIGHTS (Nov. 24, 1999), available at <http://www.hrw.org/press/1999/nov/china1025.htm>.

collective bargaining rights will serve China in a diplomatic sense by easing international pressure and threats of economic sanctions.

China cannot afford to keep ignoring its working class. Since market reforms have been introduced to the Chinese economy there has been a drastic change in the workings of the typical Chinese firm. Chinese workers are much less dependent on the state and are now influenced by market forces.¹⁷⁶ As a result, workers now have fewer rights, less job security, and virtually no bargaining power in the workplace. This decline is due to the introduction of market forces into the Chinese economy. Firms are now profit-oriented and place a premium on efficiency, thus creating layoffs and streamlining the formerly inefficient state run enterprises. Unemployment is rampant and even the employed Chinese workers are starving. A situation has been created where Chinese workers are working twelve hours a day or more for wages that barely provide subsistence.¹⁷⁷ There is no way to combat such mistreatment because Chinese workers have no leverage in the workplace and no legal means to protect themselves. The same workers who once enjoyed a vast amount of job security are now facing record numbers of unemployment and poverty.

B. Benefits to China's Transition

One possible solution to this problem is for the Chinese government to place some power in the workers' hands and effectively recognize the right of its workers to organize and bargain collectively. These rights are a critical aspect of modifying the bargaining power between workers and management.¹⁷⁸ China has made tremendous progress towards greater recognition of its workers' fundamental rights through the enactment of laws covering topics such as wages, hours, safety and sanitation in the workplace.¹⁷⁹ However, it has not ratified the key ILO conventions protecting the right to organize or to bargain collectively.¹⁸⁰ There are three reasons why China should recognize these rights: ratification of the ILO conventions will contribute to China's social stability, help China's economic development process, and mitigate the adverse effects of market competition.

¹⁷⁶ Baohua, *supra* note 84.

¹⁷⁷ See Eckholm, *supra* note 46.

¹⁷⁸ Cleveland, *supra* note 137, at 155.

¹⁷⁹ Jane Dvasi, *Kenya: A Study in International Labor Standards and Their Effect on Working Women in Developing Countries: The Case for Integration of Enforcement Issues in the World Bank's Policies*, 17 *Wis. Int'l L.J.* 347 (1999).

¹⁸⁰ Testimony of Mike Jendrzeczyk, *supra* note 15.

1. Contribute to Social Stability

Recognition of Chinese workers' right to organize and to bargain collectively will contribute to social stability throughout China by decreasing the amount of protests and strikes. Chinese workers have resorted to mass protests and strikes because they "have experienced rising income disparity and social insecurity [due to the market reforms]" and "feel economically disadvantaged, socially disenfranchised [sic] and politically excluded."¹⁸¹ They feel this way because they do not have a "workplace representative body or any other way to express their strongly felt concerns."¹⁸² The closing of many of China's state-owned enterprises has pushed workers to insist on greater collective decision-making on workplace issues and the need for a social safety network.¹⁸³ Instead of fighting its own citizens on this issue, which has growing support as evidenced by widespread work stoppages and protests, the Chinese government could gain the support of China's nearly 900 million peasants by simply recognizing their rights.¹⁸⁴ If China continues to oppress its citizens' freedom of association it risks disaffected workers turning against the state and an even greater number of protests and demonstrations.¹⁸⁵

The standard of living is rapidly rising throughout China.¹⁸⁶ However, this rising standard is only occurring amongst the newly created middle class and affluent. The lower classes are not making economic progress and their situations are worsening.¹⁸⁷ The introduction of the ILO core labor principles will aid China's workers by giving them some legal means to raise their standard of living. Happy workers do not protest and strike.

2. Encourage Economic Development

¹⁸¹ Trini Leung, *Taming the Tigers*, NEW INTERNATIONALIST, Dec. 2001, at 16, 16, available at www.newint.org/issue341/taming.htm.

¹⁸² *Id.*

¹⁸³ See BACKGROUND NOTE, *supra* note 32.

¹⁸⁴ Wen Tie-jun, *The WTO and Agriculture: How Will 900 Million Peasants Withstand China's WTO Accession?*, Hong Kong Liaison Office (Feb. 2002), at <http://www.ihlo.org/item3/wen.pdf>.

¹⁸⁵ Testimony of Mike Jendrzeczyk, *supra* note 15.

¹⁸⁶ Lynch, *supra* note 55.

¹⁸⁷ See Forney & Gough, *supra* note 6 (discussing the increasing tendency of workers to take collective action despite the Chinese government's attempt to suppress such labor movements).

China has made it abundantly clear that its main objective throughout the next five years and beyond is to sustain and promote economic development.¹⁸⁸ Recent indications of this surge in government investment in its economy are found in the fact that China spent over \$200 billion last year to undertake projects improving its infrastructure.¹⁸⁹ For example, the Chinese government is completely reshaping cities such as Chongqing, where “they are burrowing through mountains to create 600 miles of superhighways, four new railway lines, an urban light rail system and a new airport.”¹⁹⁰ The Chinese government has also promised “parks, drinkable tap water and riverside promenades for the city’s thirty million residents.”¹⁹¹ This is not an isolated example. These types of infrastructure improvements will occur throughout China for at least the next ten years.¹⁹² China’s emphasis on a growing economy stems from the government’s belief that a rapidly expanding economy will eventually provide enough jobs for China to avoid mass unemployment and silence much of its growing labor unrest and thereby ensure Communist Party control.¹⁹³

The problem with this growth plan is that China’s economy has been growing nearly seven to nine percent throughout the past decade and the country is still experiencing increasing rates of unemployment and labor unrest.¹⁹⁴ The pertinent question for the Chinese government is: when will the economy finally be large enough for unemployment and labor unrest to decline? Even if the job market continues to grow at the astronomical rates anticipated by the Chinese government, it will still be influenced by market fluctuations. If China allows its workers to organize and bargain collectively China’s problems with labor unrest will decline. While workers will still undoubtedly protest, they will be protesting for different reasons, and in much fewer numbers. The protests will be directed towards individual employers’ unfair labor practices instead of the government’s unilateral denial of their fundamental rights.

A more stable workforce is needed if China is going to expect to sustain its tremendous economic growth. Recognizing its workers’ right to organize and bargain collectively through ratification of the ILO conventions encourages worker solidarity which in turn leads to a

¹⁸⁸ Permanent Mission of the People’s Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, *Objectives and Guiding Principles of China’s Economic Development in the Next Five Years*, available at <http://www.china-un.ch/eng/14074.html> (last visited Jan. 30, 2004).

¹⁸⁹ Kahn, *supra* note 72.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ BACKGROUND NOTE, *supra* note 32.

productive workforce. Employers who oppose organized workplaces often argue that firm or enterprise performance will be jeopardized due to strikes or inefficiencies.¹⁹⁵ While these outcomes are certainly possible, it is in the workers' best interest for the firm to prosper.¹⁹⁶ Given the current situation in China, this is especially true. Chinese workers are striking and protesting because they are starving and those workers who are lucky enough to have a job are working long hours for a wage that barely keeps them fed. Their protests are not designed to put firms out of business.¹⁹⁷ Chinese workers protest and strike when conditions get so bad that they have no other recourse.

3. Mitigate Adverse Effects of Market Competition

ILO conventions recognizing the rights to organize and bargain collectively are often seen as unnecessary interference with markets and trade expansion.¹⁹⁸ As a developing country, China does not want to lose its competitive advantage in low wages and production costs.¹⁹⁹ The Chinese government will not interfere with its number one priority - sustained economic growth.

China's economic competitive advantage lies in the areas of its market potential, cheap labor, low political risk, and ongoing state enterprise reform.²⁰⁰ Adoption and enforcement of the ILO's labor principles will not have a large impact on China's economic competitive advantage because the labor principles do not hinder market forces, raise costs of production or labor, threaten China's political stability, or hurt China's state enterprise reform. In many cases, recognition of the ILO labor principles will be beneficial to China's competitive advantage through increased productivity. Enforcing minimum labor standards promulgated by the ILO conventions will have a negligible effect, if any, on the overall labor costs of doing business in China. The conventions do not call for protections, such as restrictions on working time and minimum wages, which can affect a state's comparative advantage.²⁰¹ The conventions also do not call for the setting of a global minimum wage. Even if they did, it would not matter as China

¹⁹⁵ ADAMS, *supra* note 138, at 7-8.

¹⁹⁶ *Id.* at 8.

¹⁹⁷ See Leung, *supra* note 182, at 16.

¹⁹⁸ Cleveland, *supra* note 137, at 129.

¹⁹⁹ Gang Lin, *Historical Legacy Sours China – ASEAN Dialogue*, Meeting Summary of the Sino-Southeast Asian Relations Seminar, Dec. 7, 1999, available at http://www.wics.si.edu/asia/reports/1999/ch_1299.htm.

²⁰⁰ *Id.*

²⁰¹ See Cleveland, *supra* note 137, at 139.

has already implemented a minimum wage that has had little effect, if any, on labor costs.²⁰²

Recognizing the rights of freedom of association and the right to collective bargaining may only marginally increase overall labor costs.²⁰³ Employers often oppose unions because of what is called the “union wage premium.” This is essentially a higher wage paid due to union activity in the workplace.²⁰⁴ The ILO has found that collective bargaining and related rights are essential for creating an environment that encourages productivity and innovation, attracts foreign investment, and allows the society to absorb economic shocks and emergencies such as financial crises and natural disasters.²⁰⁵ A large body of evidence also stresses the positive economic benefits of organized workplaces and their higher productivity.²⁰⁶

Productivity among China’s workers will improve once the rights articulated by the ILO conventions are recognized. “It is said that cheap [unorganized] labour contributes to low productivity and a squandering of the human resource.”²⁰⁷ There is a substantial body of evidence suggesting that the adherence to the core labor standards does not disadvantage states in international trade, but instead may improve a nation’s productivity.²⁰⁸ As China continues to transform its economic and social structure its firms and enterprises will need to introduce new technological changes and methods of accomplishing tasks to compete internationally. Organized firms will be able to adapt to the requisite changes much faster than those that are unorganized. It has been suggested that employees more readily accept technological and organizational change when their interests are expressed by credible representatives.²⁰⁹ Furthermore, evidence suggests that “nations which rely on collective bargaining as a primary method of industrial governance suffer no systematic disadvantage despite commonly held beliefs to that effect.”²¹⁰

²⁰² See Baohua, *supra* note 84.

²⁰³ See OECD, *supra* note 138, at 32.

²⁰⁴ See ADAMS, *supra* note 138, at 7.

²⁰⁵ OECD, *supra* note 140, at 32.

²⁰⁶ ADAMS, *supra* note 138, at 7 (citing to a 1984 study by Freeman and Medoff).

²⁰⁷ ILO, International Labour Standards Contribute to Development, at <http://www.ilo.org/public/english/standards/norm/whyneed/dev.htm> (last updated Oct. 20, 2000).

²⁰⁸ See OECD, *supra* note 140, at 32.

²⁰⁹ ADAMS, *supra* note 138, at 8 (citing FRANK HELLER ET AL., ORGANIZATIONAL PARTICIPATION: MYTH AND REALITY (1998)).

²¹⁰ *Id.* at 9.

VII. Conclusion

Recognizing Chinese workers' rights to organize and bargain collectively will not solve all of the problems China has encountered due to economic reforms. Many problems exist that, if left unaddressed, will undoubtedly cripple the working class and possibly China's economy. Most notably, many of China's working class compete for jobs that do not exist.²¹¹ Even though the government pumps billions of dollars into the economy there still are not enough jobs to go around.²¹² Organizing independent trade unions and collective bargaining will not help this situation as these rights do little to create jobs; they are much better at protecting employed workers. Gone are the days of the "iron rice bowl"²¹³ for Chinese workers.

The government's recognition of ILO labor rights will also not help millions of Chinese farmers. The lives of Chinese farmers are being dramatically affected by the market reforms. Because of the reforms they must compete with fluctuations in the market price of their crops as a consequence of an increase in cheaper imports from foreign competition.²¹⁴ Organizing unions and collective bargaining cannot solve these problems.

How would the lives of the laid off workers described at the beginning of this paper be different if their government were to recognize their fundamental rights to organize and bargain collectively? First of all, the men would not have to gather in a cramped living room to discuss their problems, afraid that the government could come knocking at any time and have them detained indefinitely. Secondly, Xiong, the fifty-three year-old steamfitter who reminisced about a demonstration nearly two years ago would not have to wonder "Who will stand with me?" to protest.²¹⁵ Instead, he would have the backing of his entire union and possibly many other sympathetic unions throughout China. Most importantly, the workers would not be looking to Chairman Mao as their patron saint and instead looking to each other for protection and support.

The Chinese government will benefit from the ratification and enforcement of key ILO conventions. Failure to ratify and enforce such conventions will likely result in more instability. This effect was articulated by Mike Jendrzeczyk, the Washington Director of the Asia Division of Human Rights Watch, in his testimony before the House

²¹¹ Cf. Forney, *supra* note 1 (offering a stark reminder of the millions of workers left behind in China's headlong rush to enter the global economy).

²¹² See Kahn, *supra* note 72.

²¹³ Under this system public servants were guaranteed a lifetime of security and support by the Chinese government.

²¹⁴ See Tie-jun, *supra* note 185.

²¹⁵ Forney, *supra* note 1.

Committee on International Relations: "The alternative to allowing greater freedom of association is to risk disaffected workers turning against the state."²¹⁶

The word is out among China's working class that protests, strikes, and demonstrations get results. Labor unrest is growing and the Chinese government must address the underlying reasons for this growth before the situation gets out of control. Allowing the workers to organize and bargain collectively is a method that will express to Chinese workers that the government is willing to work with them to solve their problems. Right now the government is building and maintaining an adversary relationship with the working class. This will do little to solve China's labor problems.

²¹⁶ Testimony of Mike Jendrzeczyk, *supra* note 15.

